

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

MIKE CAMPBELL & ASSOCIATES, LTD., INC.

and

Cases 31-CA-25753
31-RC-8129

UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 1428,
AFL-CIO, CLC

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DECISION AND DIRECTION OF SECOND ELECTION

Statement of the Case

Mary Miller Cracraft, Administrative Law Judge. In rapid succession, Mike Campbell & Associates Ltd., Inc. (the Employer or Respondent) discharged four of its employees and requested that a janitorial service no longer send another individual to its facility. At issue is whether these individuals were discharged because of their activities on behalf of United Food & Commercial Workers International Union, Local 1428, AFL-CIO, CLC (the Union or Petitioner) in violation of Section 8(a)(1) and (3) of the Act.¹ Additionally, General Counsel alleges that Respondent interrogated, threatened, and promised benefits to employees in violation of Section 8(a)(1) of the Act. Petitioner argues that many of the alleged Section 8(a)(1) violations interfered with conduct of an election held in a unit of warehouse employees. Petitioner requests that an affirmative bargaining order be entered to remedy this interference. In the alternative, Petitioner request that a second election be held.

¹ Sec. 8(a)(1), 29 U.S.C. §158(a)(1), provides that it shall be an unfair labor practice for any employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. Sec. 8(a)(3), 29 U.S.C. §158(a)(3), provides that it shall be an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization. . . ."

On the entire record, compiled June 9-13, 2003, in Los Angeles, California, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the Union/Petitioner and counsel for the Employer/Respondent, as well as the oral argument of counsel for the General Counsel, I make the following²

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Findings of Fact

I. Jurisdiction and Labor Organization Status

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The parties stipulated to the following: “Respondent, a California corporation, is engaged in the business of warehouse operations (i.e., receiving, storing and loading of goods) from the facilities located in Chino, California.” The stipulation continues: “During the past calendar year, a representative period, the Employer had gross revenue valued in excess of \$50,000 from sales or performances of services directly to enterprises located outside the State of California.”

15 In its answer to the complaint, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that the Union/Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

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II. Unfair Labor Practices

A. Background

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Respondent provides Trader Joe’s, a retail food chain, with the contract labor and management necessary for operation of Trader Joe’s warehouse facilities in Chino, Stockton, and Industry, California. From these warehouses, Respondent distributes dry, frozen, and refrigerated Trader Joe’s grocery products to Trader Joe’s retail food stores. Trader Joe’s owns the warehouse facilities, including shelving, equipment, and all merchandise. Signs in the warehouse state that the product belongs to Traders Joe’s.

30 Trader Joe’s supplies janitorial services for the Chino warehouse facility through Personnel Plus. Trader Joe’s is Respondent’s sole customer.

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Kevin McHugh is Respondent’s general manager. His offices are in Industry, California. The Chino warehouse manager is Doug Campbell (not related to Respondent’s owner Mike Campbell). Chino warehouse floor managers in 2002 were Mark Shetterly and Al Ontiveros. The supervisors were Gustavo Herrera, Vincente Rubio, Raul Castro, and Pedro de la Cueva. Respondent admits that these individuals are supervisors or agents within the meaning of Section 2(11) or 2(13) of the Act.

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On June 13, 2002, the Union filed a petition for recognition requesting that an election be held among certain employees at the Chino warehouse in order to determine whether these employees wished to be represented for purposes of collective bargaining by the Union. Pursuant to the terms of a stipulated election agreement, on July 24, 2002, a secret ballot election was held in the following appropriate unit of employees:

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² Credibility resolutions have been made based upon witness demeanor, the weight of respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

All full-time and regular part-time warehouse employees, including plant clerical employees (i.e. shipping and receiving clericals), employed by the Employer at the facility located at 4681 Edison Avenue, Chino, California excluding managerial employees, office clerical employees, drivers, mechanics, all other employees, guards and supervisors as defined in the Act.

The Tally of Ballots reflects that of 125 eligible voters, 123 cast ballots. Fifty-nine votes were cast for the Union, 61 votes were cast against representation by the Union, and three ballots were challenged. These challenged ballots were sufficient in number to affect the results of the election. The three challenges involved the ballots of Rosa Ortiz, Martin Bautista, and Alonso Pech. At the hearing, the parties agreed to sustain the challenge to the ballot of Martin Bautista. Bautista was challenged by the NLRB agent conducting the election because his name was not on the Excelsior List. The charging party joined in the challenge. The Employer agrees that the challenge should be sustained. Accordingly, the two challenged ballots remaining are no longer sufficient in number to affect the results of the election.

On June 13, 2002, the same day the Union filed its representation petition, the Union filed the underlying unfair labor practice charge. The Union filed an amended charge on August 26, 2002. The complaint issued on March 25, 2003.

Following the July 24, 2002 election, on July 30, 2002, the Union filed timely objections to conduct affecting the election. On April 16, 2003, the Regional Director's report on objections issued. Of the six objections originally lodged, two were dismissed and four were consolidated with the instant unfair labor practice proceedings and remain for resolution herein. Some of these objections overlap the alleged Section 8(a)(1) violations. The four objections which have been consolidated are as follows:

Objection 2: In the weeks before the election, the Employer threatened to close the petitioned-for facility if the Union won the election.

Objection 3: In the weeks before the election, the Employer engaged in interrogation of employees regarding their Union sympathies and activities.

Objection 5: In the weeks before the election, an employee whose two (2) friends wanted to be hired by the Employer was told by a supervisor that his two (2) friends would be hired if he voted against the Union in the election and talked to his co-workers about voting against the Union.

Objection 6: The location of the polling place intimidated voters because it was adjacent to the supervisors' offices, voters had to walk by the offices to vote, and the room where the voting took place was previously used by the Employer for captive audience and other meetings with employees wherein the Employer urged the employees to vote against the Union.

B. Supervisory or Agency Status of Jimenez, Rivera, and Cruz

1. Carlos Jimenez

Respondent denies agency or supervisory status of former Chino warehouse supervisor Carlos Jimenez. In 1998, Jimenez became safety director and ombudsman. Although as safety director and ombudsman Jimenez no longer directly supervises employees, I nevertheless find that he is a supervisor within the meaning of Section 2(11) of the Act.

Section 2(11) of the Act provides that,

5 The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

10 The presence of any one of these indicia suffices to confer supervisory status. *Webco Industries*, 334 NLRB 608, 609 (2001). The burden to prove supervisory status is on the party seeking to establish the status. *Bakers of Paris*, 288 NLRB 991 (1988), enf. 929 F.2d 1427, 1445 (9th Cir. 1991). General Counsel and the Union seek to establish
15 that Jimenez is a supervisor or agent of Respondent, within the meaning of Section 2(11) or (13) of the Act, in order to attribute knowledge of union activity to Respondent as well as to attribute certain statements made by Jimenez to Respondent.

20 Jimenez was night shift puller supervisor and safety director at the Chino warehouse until 1998. At that time, Jimenez transferred laterally to the position of ombudsman and continued as safety director. No announcement was made of his changed status. However, he no longer reported to work at the Chino warehouse. Rather, he was given an office in the Industry facility. Jimenez’ business cards continued to set forth his position as “warehouse foreman” until 2003.

25 As explained by McHugh, the ombudsman position was created so that employees could present their problems to the ombudsman and the ombudsman would help alleviate the problem, if possible. McHugh anticipated the ombudsman would handle both work and personal problems. Jimenez was selected to fill the position of
30 ombudsman because of his excellent skills in dealing with people and his ability to fluently speak both Spanish and English. As ombudsman, Jimenez does not have authority to hire or fire employees. According to McHugh, Jimenez investigates employees’ concerns, complaints, criticisms, or problems and then reports to upper management, where there is an attempt to resolve the problems. Jimenez may
35 recommend solutions to management as part of his report. According to McHugh, Jimenez cannot resolve workplace problems on his own. Jimenez simply presents the problems to management for resolution. However, if there is a personal problem, such as a bank account or sending money to Mexico, Jimenez resolves such problems on his own.

40 Jimenez was asked, “As Ombudsman, if an employee has a complaint, can you solve the employees’ problems?” He responded, “To try and solve them, yes, but not that I have to solve them.” In explanation, Jimenez testified,

45 The employee has his or her supervisor. The employee would perhaps want to transfer to another department. The employee comes to see me and asks me if I could assist them with the supervisor to see if there is an opportunity or a chance that the supervisor would give his or her okay to transfer him to that other department. If the supervisor approves it, I can assist them in that regard, and I
50 obtain that for them.

Jimenez further explained,

5 When sometimes the supervisor does not allow the worker in particular to go out on vacation or whenever he was not able to obtain the doctor note for the days he was absent from work. They came to see me, and I assist them to understand with the supervisor about the problem.

10 For the same reason that Jimenez was selected for the ombudsman position, he is also utilized routinely for translation during discharges or exit interviews when management perceives that a problem might arise and in order to translate the proceedings. Thus, when asked how Jimenez is involved in the discharge process, McHugh testified,

15 He's like my right-hand man, so to speak. He speaks Spanish. I can use him for some terminations when I need to insure that the employee is sort of like smoothed out, is handled properly, that we're not doing anything that would be upsetting to the employee. So I would use him. I'd ask him to go and do it. I'd give him the check and the paper and say go do it.

20 Moreover, Jimenez attended some of the sessions held by Respondent's labor consultants during the union campaign. Jimenez was asked to attend so that the employees would feel more comfortable and in order to answer questions about benefits and working conditions.

25 Finally, as safety coordinator, Jimenez trains new employees in safety procedures by showing them a video on how to lift and by training forklift drivers. Jimenez presents Respondent's rules and regulations to these new employees on their first day of employment.

30 Based upon the above testimony of McHugh and Jimenez, I find that Jimenez, as ombudsman, possesses supervisory authority to adjust employee grievances or to effectively recommend adjustment of employee grievances through the exercise of independent judgment.³ Moreover, I note that Jimenez was a supervisor until 1998. As a supervisor, he had authority to effectively recommend hiring and discharge of employees. When Jimenez' duties changed in 1998, a lateral move according to McHugh, there was no announcement to employees of the changed status. Employees thus continued to reasonably perceive Jimenez as aligned with management. Since 1998, Respondent has held out Jimenez as a problem solver. Employees may come to 40 Jimenez with problems and, thereafter, there is a reasonable expectation that Jimenez will solve the problem. Thus, Jimenez possesses supervisory authority within the meaning of Section 2(11) of the Act.

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50 ³ Were it necessary to resolve the credibility discrepancy between McHugh and Jimenez regarding Jimenez recommending solutions versus actually solving problems, I would find that Jimenez testimony was the more credible. Jimenez, after all, gave concrete examples of actual grievance resolution while McHugh's testimony was theoretical and abstract.

In making this finding, it is unnecessary to rely on Jimenez' function in the discharge process. If Jimenez acted only as a translator, this alone would be an insufficient basis upon which to find supervisory or agency status. See, e.g., *J.M.A. Holdings*, 310 NLRB 1349, 1359 (1993). However, McHugh invested Jimenez with a human resources dimension in the discharge process; i.e., to "smooth out" any problems. Although merely conducting exit interviews, including explaining the reason for discharge, is not an indicia of supervisory status, *Wake Electric Membership Corp.*, 338 NLRB No. 32 at n. 7 (Sept. 30, 2002), it is possible that Jimenez' authority was greater.

2. Labor Consultants Cruz and Rivera

Respondent also denies agency status of Fernando Rivera and Juan Cruz, labor consultants.

Section 2(13) of the Act provides that,

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

In determining agency status, common law principles of agency apply, incorporating principles of actual and apparent authority, either express or implied. See, e.g., *Shen Automotive Dealership Group*, 321 NLRB 586, 593 (1996) and cases cited therein. The Board has held that labor consultants such as Rivera and Cruz are agents of an employer. See, e.g., *Blankenship & Associates*, 306 NLRB 994 n.2 (1992), enf. 999 F.2d 248 (7th Cir. 1993). This is based on the fact that Respondent placed them in the position of a conduit where employees could reasonably believe that they spoke on behalf of management. *Three Sisters Sportswear Co.*, 312 NLRB 853, 864-865 (1993). Cf., *Juniper Industries*, 311 NLRB 109, 110 (1993). Thus, I find that Rivera and Cruz were agents of Respondent within the meaning of Section 2(13) of the Act.

C. Alleged Unlawful Discharges

1. General Observations

Many of the warehouse employees are from the Yucatan Peninsula of Mexico. They hear of jobs at Respondent's facilities through word of mouth from their "fellow countrymen" or paisano.

None of the warehouse employees who testified spoke English. Management personnel at Respondent's facilities typically speak both Spanish and English. Respondent's labor consultants are also bilingual.

The Union began organizing efforts at Respondent's Chino facility in early 2002. On May 14, 2002, Miguel Canche Martin (Canche) and his wife, Maria Elizabeth Ku Gonzalez (Ku), were discharged. Since May 14, 2002, Respondent has requested that the janitorial service, Personnel Plus, no longer send Juan Casanova to work at Respondent's Chino facility. On the following day, May 15, 2002, Jose Camilio Casanova (Jose Casanova, Juan Casanova's brother) was fired. One week later, on May 22, 2002, Miguel Lopez Mojica (Lopez) was discharged.

General Manager Kevin McHugh (McHugh) testified that he independently made the decision to discharge Canche, Ku, Jose Casanova, and Lopez. In January and February 2002, McHugh was concerned about excess overtime at the Chino warehouse. He testified he could not accomplish a reduction in overtime by working with the supervisors and managers at the Chino warehouse. Accordingly, in a 3-month period, McHugh made about 50 unannounced visits to the Chino warehouse. After McHugh surreptitiously observed Canche, Ku, Jose Casanova, and Lopez talking on more than one occasion when they should have been working, McHugh ordered that they be laid off. McHugh took this action to send a message to supervisors and managers at the Chino warehouse regarding excess overtime. However, the employees' direct supervisors were not consulted and did not recommend discharge. Although McHugh favors a policy providing warning to employees, there was no such policy in place and the employees were not warned that their behavior might lead to termination. McHugh does not directly supervise any employees. Rather, McHugh oversees office personnel and department managers in three warehouses.

In any event, Respondent's initial position letter to the NLRB during investigation of the underlying unfair labor practice charge stated that Canche, Ku, Jose Casanova, and Lopez were laid off pursuant to a reduction in force. These four were selected by McHugh, according to the position letter, because McHugh had observed them not working or not performing their job. At trial, the parties stipulated that these four were not laid off because of a work slowdown, a lack of work, or the need for a reduction in force.

Respondent asserted at trial that Juan Casanova's janitorial service was no longer needed because his project had finished. The position letter asserted that he was no longer utilized due to unsatisfactory performance. The parties stipulated at trial that Respondent's request that Personnel Plus not send Juan Casanova back to its facility was not based upon a work slowdown or the need for a reduction in force.

2. The Discharges

a. Facts

1. Canche and Ku

In 1997, Miguel Canche lived with his friends Rene and Carlos Chuc. All three are from the Yucatan. Canche learned of a job opening at Respondent's Chino warehouse through the Chucs, who learned of the opening from Carlos Jimenez, at that time Respondent's warehouse foreman. Canche accompanied Rene and Carlos Chuc to the warehouse. Rene Chuc identified Canche to Jimenez. Jimenez asked Canche if he wanted to work. Canche replied affirmatively, filled out an application, and Jimenez sent him to Vincente Rubio for training and assignment.

Thereafter, Canche lobbied Jimenez and Rubio to hire his wife, Maria Elizabeth Ku Gonzalez. Eventually, Jimenez told Canche to bring his wife into work and she was hired. Shortly after Canche was hired at the Chino warehouse, Canche and his wife moved to the residence of Juan Casanova, also from the Yucatan. On a few occasions, Jimenez gave Canche a ride to the house where Canche and his wife resided with Juan Casanova. Jimenez and Juan Casanova greeted each other at these times.

Ku began working for Respondent at the Chino facility on August 2, 2001. Her job involved repairing and cleaning damaged or broken products. For instance, when one milk container in a carton broke, the remaining undamaged containers were cleaned in Ku's department, known as "recoup." When Ku was hired, she spoke with Carlos Jimenez in the cafeteria. Her husband introduced her to Jimenez regarding the job about which he had previously asked Jimenez. Jimenez asked Canche and Ku to wait while he brought in Vincente Rubio. Rubio brought some papers which Ku signed. Then Rubio took Ku to a job in his department.

Canche worked for about two years as a "puller," retrieving merchandise from warehouse shelves to be sent to Trader Joe's retail stores. At one point, Canche received a certificate for being the best puller. After one year and ten months as a puller, Canche became a forklift driver, supervised by Gustavo Herrera.

Respondent awards forklift drivers an \$80 bonus when they move, on average, 22 pallets per hour over the two-week pay period. Lesser amounts are awarded for moving 18-22 pallets per hour (\$40) and 20 to 22 pallets per hour (\$60). Canche received the \$80 bonus for various pay periods including those ending February 24, March 10, March 24, April 7, April 21, 2002. Other forklift drivers also regularly received the \$80 bonus. In fact, according to general manager McHugh, since January 2002, Respondent paid the maximum bonus to all forklift drivers pending a new, more equitable system. Herrera told Canche on numerous occasions that he was the best forklift driver. Forklift driver Pedro Medina agreed that Herrera "always" said that Canche was number one.

Canche began assisting with union organizing efforts in March. In addition to signing an authorization card, he distributed cards, spoke to employees about the union, and invited coworkers to union meetings. At one time in April, Vicente Rubio saw Canche speaking with other employees and asked what they were talking about. Canche responded they were talking about nothing and Rubio retorted that Canche was talking too much. On May 13, when Canche was discussing the union with employees Oscar Perez and Eider Sime at Gate 14 while he was loading a truck, Jose Alonso Pech Hernandez (Pech), Jimenez' nephew, was in the vicinity, about 8 to 10 feet away. During the conversation, Canche gave Perez an authorization card to sign.

Pech agreed that he overheard employees at the Chino facility talking about the union during the spring of 2002. Although Pech was aware that Canche was a leader of the employees seeking to unionize, Pech denied that he ever heard Canche speak about the union. Pech also denied that he ever told Jimenez, his uncle, that employees were talking about union organizing. Carlos Jimenez agreed that Alonso Pech never said anything to him indicating that there was union activity at the Chino warehouse.

In late March 2002, Ku became aware of a Union campaign. She attended two union meetings. One meeting was in early April. The second meeting was about three weeks later. Ku signed a union authorization card.

Supervisor Gustavo Herrera testified that he became aware of union activity at the facility at the time that Canche was discharged. After Canche was discharged, Herrera saw him standing at the door of the warehouse handing out union literature. This was how Herrera found

out about the union organizing effort. Herrera told Doug Campbell that Canche was handing out union literature. Herrera agreed that he called Canche his number one forklift driver. However, Herrera explained that he calls a lot of the forklift drivers his number one driver, in order to encourage them.

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On May 14, Jimenez and Doug Campbell summoned Canche and his wife to Campbell's office. Jimenez told them they were laid off because work was slowing down. Canche replied that he could not believe he was being laid off. Jimenez responded that he was sorry but, "this time is your turn." Canche argued that there was another forklift driver with less seniority and again asked why he was being laid off. Canche also requested that Jimenez and Campbell consult with Gustavo Herrera, his supervisor, to see, "if I don't do a good job." Jimenez said work was slowing down. Canche argued that Herrera held a meeting just the previous night for forklift operators telling them that a lot of work was coming and no one could take any days off. Jimenez told Canche that Herrera did not know and to sign for his check.

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On the day she was discharged, Ku spoke with Rubio about there being two pallets of work, a little more than usual. Later in the afternoon, Rubio told Ku to go to the office. Doug Campbell and Carlos Jimenez were present. Campbell spoke in English. Jimenez spoke in Spanish. Ku only understood Jimenez, who said that Canche and she were being laid off because there was no work. Ku responded that there was a lot of work. Jimenez said he was sorry. Ku agreed that Jimenez asked if she understood English and when she said she did not, Jimenez told Ku that he would translate what Campbell said.

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Carlos Jimenez recalled that he told Canche that he was going to be laid off, interpreting for Doug Campbell. Jimenez told Canche there was a document for him to sign and a check would be given to him. Jimenez recalled that Canche did not want to sign and Campbell instructed Jimenez to give him his check anyway. Nothing more was said. Jimenez recalled that when Ku was told she was laid off, she simply signed and took her check. Jimenez believed this occurred in a separate meeting. Carlos Jimenez testified that he did not know there was union activity at the facility at the time of these discharges. Doug Campbell did not testify.

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2. Juan Casanova

Juan Casanova has been employed by the union to perform picket line work for about four or five years. From 1998 until 2000 or 2001, Juan Casanova picketed the Chino Ranch Market five days a week for about 7 hours a day. His sign said do not purchase at Chino Market and displayed the name of the Union. In 1998 or 1999, during his picketing duties, Juan Casanova saw Carlos Jimenez about once a week. Juan Casanova knew Carlos Jimenez as his fellow countryman; i.e., from the Yucatan. According to Juan Casanova, they usually waved to each other in greeting. Carlos Jimenez agreed that he saw Juan Casanova picketing on one occasion and waved to him and called paisano. Jimenez thought this was in 2001.

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Canche and his wife lived with Juan Casanova for four or five years. Carlos Jimenez sometimes provided Canche with a ride home and took Canche to Juan Casanova's house. Sometimes Juan Casanova and Carlos Jimenez waived to each other when Jimenez brought Canche home.

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Juan Casanova worked for Respondent at the City of Industry warehouse facility for about one month. Juan Casanova learned of this job when he was at a party hosted by the Caballero family. At the party, Carlos Jimenez told Juan Casanova he needed as many people as Juan Casanova could find to report to the City of Industry warehouse, under construction at that time. Juan Casanova found 5 or 6 others and departed for the facility about 15 minutes

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later. Juan Casanova found the person in charge of construction, told him that Jimenez had sent them, the person in charge said he was aware that they were coming, and put them to work. Carlos Jimenez agreed that he gathered employees to work on this construction. He thought this was in 1996.

In the spring of 2002, Juan Casanova spoke with Jose Casanova, his brother, as well as Canche and Ku about injustices at the Chino warehouse. Juan Casanova told them to contact the Union. In April 2002, Juan Casanova began distributing authorization cards to employees at Respondent's Chino warehouse. He also attended four or five union meetings. In early May 2002, Juan Casanova was sent by Personnel Plus to Respondent's Chino facility to perform janitorial work. On May 14, Personnel Plus contacted Juan Casanova and told him that Respondent no longer needed his services. The parties stipulated that Respondent requested that Personnel Plus no longer send Juan Casanova to its Chino facility. On May 15, Personnel Plus sent Augustin Miranda to the Chino warehouse. Miranda had worked at the warehouse in January 2002.

Pedro de la Cueva Medina (de la Cueva) supervises janitorial employees supplied by Personnel Plus through contract with Trader Joe's. During the spring of 2002, the number of janitorial employees varied but was usually around 10. De la Cueva calls Personnel Plus as he needs more janitors or no longer needs janitors. The janitors sometimes perform specific jobs such as deep cleaning or separating pallets. At the time that Juan Casanova was sent to the Chino warehouse, de la Cueva called for individuals to perform a deep cleaning for two or three weeks. De la Cueva called when the project was not yet complete and told Personnel Plus that he was about to finish the project and would no longer need Juan Casanova. De la Cueva believed that he learned about employee organizing after he told Personnel Plus that he no longer needed Juan Casanova. De la Cueva agreed that he was not concerned about the quality of Juan Casanova's work.

Juan Casanova denied that Pedro de la Cueva ever talked to him about how long his employment would last. Juan Casanova also denied that he was ever told that his job was a temporary assignment. Juan Casanova said he picked up pallets, cleaned everything which remained on the aisles left by the pullers, cleaned broken materials, and cleaned the bathrooms. On the basis of their relative demeanors, I credit Juan Casanova's testimony over that of de la Cueva. I find that Juan Casanova was not sent to Respondent's Chino warehouse for a discrete project. This conclusion is reinforced by the fact that Personnel Plus sent another employee to work for Respondent on the day after Juan Casanova's services were no longer required.

3. Jose Casanova

Jose Casanova began working as a puller at Respondent's Chino facility on November 14, 2000. He was discharged on May 14, 2002. His regular shift was Wednesday through Sunday, 2:30 p.m. to 1 a.m. Jose Casanova learned of the organizing drive in March 2002. He began distributed union authorization cards to his co-workers. He attended union meetings. He spoke to about 30 workers during break time.

On May 14, Carlos Jimenez, who agreed he knew that Juan and Jose Casanova were brothers, told Jose Casanova that he was laid off. According to Jose Casanova, Carlos Jimenez said: "Look, fellow countryman, you know that Miguel Canche and Elizabeth Gonzales was in turn for a layoff yesterday." Jose Casanova said yes, he knew that. Jimenez continued: "Well,

now it is your turn.” Jose Casanova responded, “Why are you terminating me, yesterday I came to do overtime and today is my workday and you are telling me that there is no work. It cannot be possible, fellow countryman.”

5 According to Jimenez, he merely interpreted what Doug Campbell said in English into Spanish for Jose Casanova. Doug Campbell told Jimenez to inform Jose Casanova that he was going to be laid off, Campbell had his paycheck and a document for Jose Casanova to sign. Jose Casanova asked where to sign. Jimenez did not recall any further conversation.

10 About three weeks after his discharge, according to Jose Casanova, supervisor Raul Castro called him and asked what happened. Jose Casanova told Castro he was laid off for lack of work. Castro countered, “no, Jose. I knew that they fired you because you were organizing the employees with the union.” Castro continued that had he known this prior to the discharge, he would have advised Jose Casanova not to engage in union activity because now he was the
15 one who got hurt.

Castro testified that after Jose Casanova was discharged, a puller, Alejandro Azaueta, told Castro that Jose Casanova wanted Castro to call him and gave Castro Jose Casanova’s telephone number. Castro called and Jose Casanova asked for work at the warehouse. Castro
20 said he would have to ask. Castro denied asking Jose Casanova, “what happened, why did they terminate you.” Castro denied telling Jose Casanova that he was discharged because he was organizing the employees for the union. Castro denied saying if Jose Casanova had told him he was trying to unionize, Castro would have advised him not to do so. Based on their relative demeanors, I credit Jose Casanova’s testimony over that of Castro

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4. Lopez

Miguel Lopez Mojica (Lopez) began working at Respondent’s Chino warehouse as a puller on October 2, 2001. He was laid off on May 22, 2002. In January or February 2002,
30 Lopez learned of a union organizing campaign at the Chino warehouse. Lopez began attending union meetings, talking to other employees about the union, and distributing union authorization cards. Two of the union meetings were held at Lopez’ house. Lopez estimated he had about 20 conversations with co-workers about the union. At various times supervisors Raul Castro, Vincente Rubio and Al Ontiueros were in the vicinity. For instance, on one occasion, Lopez was
35 speaking to two co-workers while he was pulling items in aisle 8. Lopez told them not to quit attending union meetings and not to stop supporting the union. He urged them to vote for the union. Vincente Rubio, Lopez’ supervisor, came by on a golf cart and observed the employees talking. Rubio continued on. Lopez worried aloud, “I wonder if he heard me.” Rubio denied that he spoke about the union to employees prior to the election. Rubio did not recall driving his cart
40 through aisle 8 while Lopez was speaking to two other employees.

On May 19, 2002, Lopez attended a union meeting in a city park. He spoke to the employees encouraging them to press on in their effort to unionize. On May 22, Vincente Rubio told Lopez to report to the office. Carlos Jimenez and Doug Campbell were present. Jimenez
45 gave Lopez his final paycheck and told him he was laid off. Jimenez said that work had slowed down and when it picked up, Lopez would be called back. According to his affidavit, which Lopez agreed was true, Lopez protested that he could see there was a lot of work and he was working overtime. According to his affidavit, Lopez agreed that Jimenez appeared to be interpreting for Campbell. Lopez also agreed that his affidavit did not contain any mention of
50 being called back to work although Lopez asserted that this had actually been stated.

Carlos Jimenez testified that he had no part in deciding that Lopez should be terminated. He attended the session in which Doug Campbell told Lopez, through Jimenez interpretation, that he was laid off. Jimenez recalled that Campbell told Lopez that he was laid off. Jimenez could not recall whether there was any discussion of calling Lopez back to work.

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5. McHugh's Observations

General Manager Kevin McHugh is responsible for the Chino, Stockton, and Industry warehouses. Managers and supervisors at these facilities typically handle personnel matters including the hiring and firing of employees. In January and February 2002, Trader Joe's new Stockton warehouse facility became fully stocked and ready for operation. Trader Joe's awarded the contract for operation of that warehouse to Respondent. McHugh testified that he expected the opening of the Stockton facility to cause a decrease in overtime at the Chino facility. McHugh became concerned in March. He testified:

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Well, I started looking at the overtime, why the overtime was so high, and I couldn't get any really good answers from my management team out there. It was always one excuse or another. You know, a new order came in or whatever and it wasn't a good answer, and I really did not have the greatest confidence in their ability to manage the business. So I took it upon myself to just start planning some surprise visits out there to see exactly what the work force was doing and how they were functioning.

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McHugh's surprise visits to the Chino warehouse began in March. He made 8 or 9 such visits in March and about 20 in April and another 15 in May. McHugh did not sit in the office and read reports, which he had generally done on prior visits. Rather, he walked the warehouse. McHugh testified that he decided to walk the warehouse rather than ride a golf cart, the common mode of transportation for management in the warehouse, because he did not want to call attention to his presence. McHugh concluded from these visits that there were a lot of people who were not performing their work.

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McHugh observed a worker sometime in mid-March, later identified to him as Canche, speaking with a female employee in the recoup area. The female employee was later identified to McHugh as Ku. They spoke for 7 or 8 minutes while McHugh watched. McHugh did not learn that the two were married until after their terminations. About two weeks later, McHugh observed Canche and Ku speaking in the same area. In all, McHugh observed Canche and Ku speaking to each other on three occasions in the recoup area. McHugh also observed Canche on the dock between pallets just standing there for as long as five minutes, doing nothing, on three occasions.

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In mid-March, McHugh observed Lopez in aisle 1 where "demo" products are stored. McHugh came upon Lopez with "his pallet jack and himself parked in between two pallets." McHugh observed Lopez sitting on the battery part of the pallet jack for 15 minutes. McHugh learned Lopez's identification from Vincente Rubio. McHugh observed such behavior "on numerous other occasions."

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McHugh also observed Jose Casanova on an occasion in late March sitting in the juice aisle for at least 10 minutes. McHugh thereafter observed Jose Casanova not working in early April, just standing on the dock where he had no reason to be. On this occasion, Jose

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Casanova stood for five minutes. McHugh observed similar behavior on “numerous other occasions.” Once, in the first part of May, McHugh saw Jose Casanova in the back of the warehouse in a pulling aisle with racks standing beside his empty pallet jack. McHugh watched for 10 minutes.

McHugh continued to observe such behavior on the part of Lopez, Canche, Ku, and Jose Casanova. “I just was seeing the same people doing that and I said enough’s enough.” Moreover, McHugh noted that the amount of overtime was rising while the volume was decreasing. “It meant that there were a lot of people that weren’t working and there was a lot of supervisors that weren’t supervising and a lot of managers that probably didn’t care.” McHugh never spoke to any of the employees regarding his observations. The reason he singled out Lopez, Canche, Ku, and Jose Casanova for termination was because, although he observed many employees standing around not working when they should have been working, these employees were not working on repeated sightings.

McHugh ordered final paychecks for Canche, Lopez, Ku, and Casanova. McHugh instructed Carlos Jimenez to let the employees know that they were laid off. McHugh explained that employees could get their benefits if they were laid off and it also precluded Economic Development Department hearings. McHugh also observed Rbindranath T. Mancilla in a dark corner in aisle 99 on one occasion during his March, April and May 2002 unannounced visits to the Chino warehouse. Rabindranath T. Mancilla was laid off around the same time that Canche, Lopez, Ku, and Jose Casanova were laid off.

McHugh testified he felt that by getting rid of the hourly people who were not working, he would be sending a message to the supervisors. However, there is no evidence that the supervisors were told why the hourly employees were discharged. McHugh testified that he never told Carlos Jimenez the reason the four were discharged. McHugh agreed that he never told any of the supervisors that the reason the four were fired was because he was upset about excessive overtime. None of the supervisors was ever warned about granting excessive overtime.

Former forklift supervisor Gustavo Herrera agreed that he did not know why Canche was terminated. Herrera was not involved in the termination. No one asked him about Canche’s work performance prior to the termination. Puller supervisor Vincente Rubio hired and supervised Miguel Lopez and Jose Casanova. Rubio was not involved in the termination of Lopez or that of Jose Casanova. He agreed that their work was fine.

For the period April 1 through July 31, 2002, Respondent’s payroll records reflect that 20 employees quit, 7 employees failed to return to their jobs, and 5 employees were laid off. Aside from the four alleged discriminatees, the other layoff occurred on May 22. Although Respondent contends that the alleged discriminatees were terminated for cause, their separation records indicate that they were laid off for lack of work.

A summary of total overtime and number of cases of merchandise moved, relied upon by Respondent, indicates no improvement in overtime hours following the discharge of the four alleged discriminatees. Although Respondent did not calculate the number of cases per hour or the number of cases per employee, these figures do not indicate any increased productivity in June, July, or August 2002. Respondent did not provide information for September 2002 through April 2003. However, Respondent did provide summary information for May 2003. Based on this information, it appears that in May 2003, productivity increased substantially. However, no pattern of improvement can be inferred due to the limited information provided.

	Month	Regular Hours	Overtime Hours	Double Time Hours	Total Hours	Cases	Cases per Hour	Number of Employees	Cases per Employee
5	2002								
	January	22,346	1800	318	24464	1273539	52.06	135	0.39
	February	21375	2159	455	23989	1210242	50.45	136	0.37
	March	21270	2570	508	24348	1296695	53.26	137	0.39
10	April	21715	1596	285	23596	1205222	51.08	141	0.36
	May	22671	2367	462	25500	1330872	52.19	138	0.38
	June	20898	1564	290	22752	1140879	50.14	131	0.38
	July	21709	2155	350	24214	1150368	47.51	128	0.37
15	August 2003	21429	1822	253	23504	1149765	48.92	128	0.38
	May	17488	1963	373	19824	1221102	61.60	102	0.60

20 In addition to the failure of Respondent's data to support McHugh's stated reason for surprise visits to the Chino warehouse, it strains plausibility (1) that a high level general manager of a successful operation could not control overtime by speaking to lower level management; (2) that in order to remedy the overtime problem, such a high level manager would make a total of 50 unannounced visits to one of the three warehouses he runs; (3) that this same high level manager ordered the discharge of four relatively long-term employees with good work records because the high level manager observed them standing around talking when he thought they should have been working, without first speaking to their supervisors; (4) that he would order their discharges to be conveyed to them as layoffs when he was attempting to send a message to the supervisors that they were allowing too much overtime; (5) that he would conclude that "lay off" of these four employees would communicate to the supervisors and managers that too much overtime was being allowed despite the fact that he failed to convey this message to them in any way and did not let them know that this was the reason the four employees were discharged. Accordingly, I find that Respondent's stated reasons for the discharges are inherently incredible and unworthy of belief.

35 b. Framework of Analysis

40 In all cases turning on employer motivation, causation is determined pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Initially, the General Counsel must prove, by a preponderance of the evidence, that protected conduct was a "motivating factor" in the employer's decision. To establish this showing, the General Counsel must adduce evidence of protected activity, Respondent's knowledge of the protected activity, Respondent's animus toward the protected activity, and a link or nexus between the protected activity and the adverse employment action. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). If the General Counsel makes this initial showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the employees' union activity. *American Gardens Management Co.*, 338 NLRB No. 76, slip opinion at 2 (Nov. 22, 2002), citing *Taylor & Gaskin, Inc.*, 277 NLRB 563 n.2 (1985), both incorporating *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

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c. **Analysis**

Activity: Certainly Canche, Jose and Juan Casanova, and Lopez credibly testified that they were actively involved in soliciting their coworkers to support the union. Although Elizabeth Ku's activity was to sign an authorization card and attend union meetings, I note that she is the wife of Canche. Thus, General Counsel has shown that Canche, Ku, Jose and Juan Casanova, and Lopez engaged in protected activity or union activity.

Knowledge: There is little direct evidence of knowledge. For instance, although Canche's supervisor Vincente Rubio approached while Canche was talking with other employees, there is no evidence that Rubio actually heard the discussion among employees. Additionally, although Rubio may have been in the vicinity of Lopez when he distributed union authorization cards and spoke about the union to coworkers, there is nothing upon which to base a finding that Rubio actually heard or saw these activities.

However, knowledge need not be directly established. Rather, a finding of knowledge "may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn." *Hospital San Pable, Inc.*, 327 NLRB No. 59 (1998); see also *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995). Knowledge may be inferred from the timing of allegedly unlawful discharges, abrupt termination of a group of union supporters, and implausible or conflicting reasons advanced for the discharges. See, e.g., *North Atlantic Medical Services*, 329 NLRB No. 6 (1999). *Greco & Haines*, 306 NLRB 654 (1992).

Prior to the advent of union activity at the Chino warehouse, Carlos Jimenez knew that Juan Casanova picketed for the Union. Jimenez also knew that Juan and Jose Casanova were brothers and that Canche and Ku lived with Juan Casanova. Jimenez' nephew Pech was aware that Canche was a leader of the union organizing effort. The fact that Canche, Ku, Lopez and Juan and Jose Casanova were discharged within days of each other supports an inference that Respondent knew of their union activity. Moreover, these four individuals were well known to Respondent, through Jimenez, to be relatives and close friends. As to knowledge of Lopez' union activity, it is additionally established that prior to Lopez' discharge, supervisor Raul Castro warned Jose Casanova that anyone else engaged in union activity would be harmed. Moreover, after Canche was discharged, supervisor Herrera saw Canche leafleting for the union in the parking lot and reported this to Doug Campbell. At this point, there is no doubt that Respondent became generally aware of union activity at its Chino facility. I have already found Respondent's reasons for selection of the four employees for discharge as highly implausible. From these findings, I infer that Respondent had knowledge of their union activity.

Animus and Link or Nexus: Direct evidence of animus toward the union comes from Castro's statement to Jose Casanova that he was fired for his union activity. Based upon the direct evidence of animus as well as my previous finding that Respondent's reason for the "layoffs" was pretextual as well as my finding that Respondent's direction to Personnel Plus not send Juan Casanova for further janitorial duty was not motivated by a precise project, I infer a discriminatory motive for Respondent's actions.

Regarding Respondent's *Wright Line* burden, I have previously found that it's reason for the layoff of the four employees was pretextual. I note, further, that Respondent has shifted its explanation for the layoffs or discharges. Although the basic reason for selection of the individual discriminates has remained constant (McHugh saw them standing around), the mechanics of whether they were actually laid off for lack of work or discharged to send a message to the supervisors and managers about overtime does not instill confidence in the explanation provided. Moreover, as to Juan Casanova, I find that Respondent did not complete

a project requiring that Juan Casanova's Personnel Plus assignment be altered. This is manifest by Respondent's replacement of Juan Casanova on the following day with another Personnel Plus employee. Accordingly, I find both as to the employees of Respondent as well as Juan Casanova, Respondent has failed to show that the same actions would have taken place in the absence of their union activity.

D. Alleged Interference, Restraint and Coercion

1. Castro/Jose Casanova Conversation

As mentioned before, about three weeks after his discharge, Jose Casanova spoke with supervisor Raul Castro by phone. According to Jose Casanova, Castro asked why Jose Casanova was fired. Jose Casanova responded, "Supposedly because there was no work they laid me off." Castro responded, according to Jose Casanova, "No, Jose. I knew that they fired you because you were organizing the employees with the union." The conversation continued, Castro telling Jose Casanova he could have advised him not to get involved. Then Castro asked: "Look, Jose . . . do you know anyone else who is stirring things up at the warehouse with the union?" Jose Casanova responded that he did not. Castro continued, "if there is someone else who is organizing at the warehouse that person, tell me who that is so I can advise him so that he does not lose his job like you did."

Although Castro agreed that he spoke with Jose Casanova after Jose Casanova was discharged, Castro said that Jose Casanova was merely looking for work. Castro denied any mention of the union during the conversation. Castro specifically denied that he told Jose Casanova that he knew Jose Casanova was discharged for his union activity, that he asked if any other employees were involved or that he stated that others would lose their jobs. Based upon their relative demeanors, I credit the testimony of Jose Casanova.

In determining whether a supervisor's questions to an employee constitute an unlawful interrogation, the Board examines whether, under all the circumstances, the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub. nom. Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Under this totality of circumstances approach, the Board examines factors such as the employer's background (i.e., whether there is a history of employer hostility and discrimination); the nature of the information sought (e.g., whether the interrogator appeared to be seeking information on which to base action against individual employees); the identity of the questioner (i.e., his position in the company hierarchy); place and method of interrogation (e.g., whether the employee was called from work to the boss' office; whether the tone of the questioning was hostile or threatening); and truthfulness of the reply. *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Although "strict evaluation of each factor" is not required, these "useful indicia ... serve as a starting point for assessing the totality of the circumstance[s]." *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998).

Heartshare Human Services of New York, Inc., 339 NLRB No. 102, slip opinion at 2 (July 29, 2003). Based upon these factors, especially the nature of the information sought, I find that Castro's question to Jose Casanova was an unlawful interrogation. Accordingly, I find that by asking Jose Casanova whether there were other employees organizing for the union, Respondent interfered with, restrained and coerced employees in the exercise of their Section 7 rights.

2. Pre-election Meetings Conducted by Respondent

Consultant Juan Cruz and Fernando Rivera were present at Respondent's Chino facility from June 15 through July 24, Monday through Friday. They conducted employees meetings throughout this time and showed videos at some of these meetings. The complaint alleges that several days before the July 24 secret ballot election, the consultants told employees that if the Union won the election, Respondent would not negotiate with the Union, the employees would go on strike, Respondent's business would nevertheless continue, and there was a mile-long waiting list for employees' positions. The complaint also alleges that during these meetings, employees were told that that if the Union won the election, Respondent's Chino facility might be shut down.

According to puller Miguel May, a video shown by Juan Cruz stated that Respondent "would not accept the bargaining from the union." May also recalled that the video stated that if employees supported the Union, Respondent was "going to close the company. . . ." May testified further that the video stated that if employees supported the Union, they would lose their jobs; Trader Joe's would no longer utilize Respondent; and employees should think about their families. It is unclear from May's testimony whether all of these statements were recalled from the video or from Cruz' accompanying speech.

Nine-year employee Epigmenio Dominguez was a forklift driver in May 2002 at the Chino facility. He was promoted to a supervisory position in April 2003. Dominguez attended meetings conducted by the consultants prior to the election. He recalled that Juan and Fernando conducted these meetings. Dominguez recalled that at the first meeting, sometime in early June, Fernando said that Respondent's only customer was Trader Joe's. If the union came in, perhaps Trader Joe's would not want to work with Respondent. Dominguez testified that Fernando also said that in case the union won at Respondent's, if Respondent did not want to negotiate, perhaps the union would go out on strike. Dominguez agreed that his affidavit states: "that the consultant said that there would be a strike if the union came in and the employees would not have a job if Mike Campbell would not want to negotiate." Dominguez continued that Fernando said Respondent had the right to negotiate or not to negotiate. Dominguez recalled some mention of the union presenting a contract about which Respondent could negotiate or not negotiate. At another meeting with the consultants, probably in late June, Dominguez recalled a video about Farmer John's. Employees at this manufacturer and packinghouse went on strike and the facility was closed and employees lost their jobs. Dominguez recalled that Antonio Sanchez and Efren Ramos also attended this meeting.

Puller River Gamboa testified the consultants asked why employees wanted a second or third boss. They asked employees to give Respondent an opportunity because if the union won the election, Respondent was not obligated to sit down and negotiate. Gamboa continued, "Furthermore, he said that Trader Joe's would remove – would take the contract away from Mike Campbell and what would then happen with us, that we would end up without a job and without a paycheck." Gamboa's affidavit says that the consultants told employees that Trader Joe's was not obligated to sit down and negotiate with the union. Gamboa agreed that his affidavit was accurate. He also agreed that the further statement in his affidavit: "They [the consultants] told us that Trader Joe's could seek another contract and leave Mike Campbell without a contract" was true. Finally, Gamboa agreed that the consultants said, as set forth in his affidavit: "They [the consultants] asked us what we thought would happen to us if this [Trader Joe's withdrew Respondent's contract] happened, they told us that we would be left without a job."

Forklift driver Pedro Medina Lopez (Medina Lopez) testified the consultants told employees that if the union won the election, employees would go on strike. Work would continue as usual and there was a mile long list of people waiting for their jobs. Additionally, they said that Mike Campbell already had his millions put away and he could retire any time he wanted. In response to a leading question, Medina Lopez stated that the consultants told employees that Respondent was never going to negotiate with the union. Medina Lopez thought he attended about 20 meetings and he did not recall at which specific meeting any of these statements was made.

Consultant Juan Cruz denied that he ever told employees that things were about to change or that he asked the employees if they wanted Raul Castro for a supervisor. Cruz denied that he told employees that if the union won the election, employees would go on strike and would be picketing but work would continue as usual and there was a mile long line of people wanting the employee's jobs. Cruz denied that any statement was made that Mike Campbell already had his millions put away and he could retire whenever he wanted. Cruz denied that any statement was made that Respondent would never negotiate with the union. Cruz recalled that an employee asked what would happen if Trader Joe's pulled the contract. Cruz responded that he could not answer the question because he could not foresee the future.

Carlos Jimenez attended several of these meetings. However, he denied that he ever asked employees if they wanted Raul Castro for a supervisor. Jimenez testified that the consultants did not tell employees that if the union won the election there would be a strike. They did not tell employees that they would be out picketing. They did not say that there was a mile-long line of people waiting for jobs. They did not say that Mike Campbell already has his millions put away for retirement. They did not say that Mike Campbell would not negotiate with the union.

During these meetings, employees frequently asked Cruz what would happen if the union won the election. According to Cruz, he responded that things could change according to what the union and the company negotiated. Another question, according to Cruz, was whether the company would close if the union won the election. Cruz uniformly responded, absolutely not. Employees also asked about the relationship between Trader Joe's and Respondent. Cruz responded to this question that he could not foresee the future. He also responded that Respondent would sit down and bargain with the union in good faith.

When Cruz showed the videos to employees, he never told them that the company would not accept the union and would close if employees voted in the union. He never told employees directly or by suggestion that they would lose their jobs. Cruz never told employees or Miguel May individually that Trader Joe's would no longer use Respondent if employees voted for the union.

Cruz denied that he ever stated that if the Union won the election, Respondent would have the choice of negotiating or not negotiating with union. Cruz denied that he ever told any employee that Respondent could decide not to negotiate and as a result there would be a strike and employees would lose their jobs. Cruz denied that he ever told any employee, "Give Mike Campbell an opportunity because if the Union should win, Mike Campbell is not obligated to negotiate with the Union."

Cruz recalled that employees asked if Trader Joe's would have to negotiate if the union won. Cruz told employees that Trader Joe's would not sit down and negotiate. Rather, Mike Campbell is going to sit down and negotiate with the Union.

Fernando Rivera generally testified in accord with Cruz. Rivera did not ever tell an employee that the company would not negotiate with the union if the union won. Although there was discussion about strikes, Rivera recalled saying that the company had the right to continue operating if there was a strike. Rivera never told employees that there would or would not be a strike. Rivera told employees they could not be discharged for going on strike but the company had the right to bring in employees to replace the strikers. Rivera also told employees that if strikers wanted to come back to work, they would be returned to their jobs if their position was open. If their position was not open, they would be put on a preferential list. Rivera never heard Juan Cruz tell any employee that if the union won the election, Mike Campbell had the choice of negotiating or not negotiating with the Union. He never heard Cruz tell an employee to give Mike Campbell an opportunity because if the union wins, Mike Campbell is not obligated to bargain. Rivera did not ever hear Carlos Jimenez tell employees that things were going to change or ask employees if they wanted Raul Castro for a supervisor. Rivera never heard any mention of a mile-long line of individuals waiting for jobs. Rivera never heard anyone say that Mike Campbell already had his millions and he could retire anytime he wanted. Rivera never heard anyone say that if the union won the election, the Chino warehouse would be closed.

Although I conclude that the employees believed they were truthfully testifying to what the consultants said and what they heard on the video, I find that they did not hear these statements correctly. This is borne out most strikingly by the videos. Employees testified that the videos stated that if the union won the election, Respondent could chose to negotiate or not to negotiate. At my request, the employees then watched the video and agreed it was the video they were shown by the consultants. The English version of the video "Collective Bargaining: The Party's Over," which was authenticated as a true translation of the Spanish version of the video, states that union contracts do not just pop out of then air. Nothing is automatic. However, none of the union promises can come true unless both parties agree. Even the smallest issue can hold up a contract. The video quotes the NLRA Section 8(d) duty to bargain in good faith noting that "such obligation does not compel either party to agree to a proposal or require the making of a concession." The video continues that the parties start bargaining from the status quo ante and notes that employees may end up with more, the same, or less. The video characterizes employee wages, benefits, and working conditions as union bargaining chips which may be traded away for such things as dues checkoff. However, no where in the video is there any mention of refusal to negotiate or a right not to negotiate.

In the video entitled "Union Strikes: A Lot on the Line," there is mention of the company's right to continue operating during a strike, the company's right to hire replacements, and a striker's right to reinstatement. However, there is no mention of employees going on strike if the union won the election or a mile long waiting list for employee positions.

I find that Respondent, through Rivera and Cruz, did not tell employees that if the union won the election, Respondent would not negotiate with the union, the employees would go on strike, its business would continue, and there was a mile long waiting list for their positions. Nor did Respondent, through Rivera and Cruz, tell employees that if the union won, the Chino facility would shut down.

3. Herrera/Medina Lopez Conversation

The General Counsel alleges that supervisor Gustavo Herrera told an employee that Respondent would shut down the Chino warehouse if the employees did not vote for the Respondent. General Counsel also alleges that Herrera asked an employee how he was going to vote. Petitioner claims that these statements and questions interfered with the election.

Forklift driver Pedro Medina Lopez (Medina Lopez) testified he spoke with his supervisor Gustavo Herrera on a Tuesday or Wednesday in mid-June. Herrera asked Medina Lopez if anyone had spoken to him about the union. Medina Lopez responded affirmatively, stating that Vincente Rubio and he had spoken about Rubio's past experiences with unions. Herrera asked Medina Lopez how he was going to vote and Medina Lopez responded he was going to vote for the company that was paying him. After a leading question, Medina Lopez recalled that Herrera told him he "had to vote yes for the company, that the company was not going to support lazys." When asked, "Do you recall if he said anything about losing your job?" Medina Lopez responded, "Yes, he did say it, that we were not going to – that we could lose our jobs. There were many things that he said, I don't recall exactly everything."

Herrera denied that he said anything to any employee about what would happen if the Union won the election. Herrera also denied that he ever asked an employee how he was going to vote. Herrera testified that he never told any employees that the Chino facility would be closed if the union won the election. A few weeks before the election, Herrera recalled a conversation with Medina Lopez. When asked what was said in this conversation, Herrera said,

Well, I had been working sometime with [Medina Lopez]. Years. And I felt confident of him and that we had been working together for such a long time that it was time for us to demonstrate to prove to the Company that we were with them.

Herrera denied that he told Medina Lopez he was once in a union, that the company would close if the union won the election. Herrera denied that he asked Medina Lopez how he was going to vote. Herrera denied that he said anything like the company will not support lazies. Herrera denied that he told Medina Lopez to vote yes or to vote no or that employees could lose their jobs.

Based on their respective demeanors and inherent probability, I find that Herrera did indeed asked Medina Lopez how he was going to vote and told him that Respondent would shut down its Chino warehouse if employees did not vote for Respondent. This question and statement interfered with, restrained, and coerced employees in violation of Section 8(a)(1).

4. Jimenez and Cruz speak to Miguel May

The complaint alleges that Carlos Jimenez and Juan Cruz promised an employee benefits if he dissuaded his coworkers from voting for the Union. The record reflects that after a meeting with the consultants, puller Miguel May spoke with Cruz and Carlos Jimenez. Jimenez and Cruz asked May to convince other employees not to support the Union by telling other employees that if they would give Respondent a chance, employees would receive benefits such as insurance and better wages. May asked what he would get for doing as Jimenez and Cruz requested. According to May, Jimenez responded that May would not be terminated and if Respondent won the election, May would receive \$40. May testified that he received the \$40. Respondent's payroll records reflect a miscellaneous payment to May dated July 31, 2002 of \$40.52.

Cruz recalled that during one of the meetings, Miguel May told Cruz that a union organizer told him that if the union won the election, the very next day things would be better for the employees. May asked Cruz if this was correct. Cruz responded that this could happen. Then Cruz explained the process by which the results of the election are certified and, if the

union wins, the parties sit down and negotiate and once a contract is signed, things can improve, stay the same, or be less than the current conditions. Cruz denied that he ever said that if the union lost the election, employees would get more salary or insurance or other benefits. Cruz denied that he ever asked employees to give Respondent a chance.

Cruz recalled another meeting with May and Carlos Jimenez. However, although May could not remember any of the conversation, he specifically denied that he asked May to convince his coworkers to vote against the union. Cruz denied that he asked May for the names of coworkers to contact. Cruz denied that Jimenez ever told May he would be paid \$40 for this.

Respondent's records indicate that federal tax in the amount of \$25.82 and state tax in the amount of \$14.70 were erroneously deducted and then refunded on July 31, 2002. According to McHugh, this payment was an adjustment made by the new payroll company after they took over on July 1, 2002, to correct prior erroneous dependent deductions.

Carlos Jimenez testified that never asked an employee how the employee would vote, about the employee's union activity and never discussed, prior to the election, the union or the election with Alonso Pech. Jimenez did not recall any meeting with Miguel May and Juan Cruz in the warehouse. Jimenez denied that he or Juan Cruz ever said anything to May about the supporting the company, about convincing coworkers not to vote for the union. Jimenez denied that he ever gave May the names of employees to be contacted about the election. Jimenez denied that he had any discussion with May about receiving \$40 and denied that he ever told May that he would not be laid off or terminated if the company won the election. In fact, according to Jimenez, he never had any conversation with May about the union or the election.

I credit Cruz and Jimenez based both on their relative demeanors and the inherent probabilities as well as the documentary evidence. Accordingly, this allegation is dismissed.

5. Herrera/May Conversation

The complaint alleged that on or about July 22, 2002, Respondent, acting through Gustavo Herrera, promised to hire two friends of an employee if the employee voted against the union in the upcoming election. Puller Miguel May testified that he spoke with supervisor Gustavo Herrera about two days before the election to ask for work for some friends who had just arrived from Mexico. Herrera responded, according to May, that he would hire May's friends after the election if May voted for Respondent. In any event, May agreed that Respondent did not hire his two friends.

Herrera recalled speaking with May at Herrera's desk in the warehouse. May asked if Herrera had work for two friends. Herrera consulted with Cruz and came back and told May that at the moment he "could not help him because they were in negotiations and that after the voting, whatever the results, if there were open positions, perhaps we could help them."

Consultant Juan Cruz recalled speaking with May in Carlos Jimenez' presence. The conversation took place somewhere in the warehouse. May asked them if his friends or cousins from Yucatan could get jobs. Cruz replied that they could come and apply and if the company needs employees, there was no reason they could not be hired. May offered that if his friends were hired, May would vote for the company in the election. Cruz told him no. Cruz told May that he could vote any way he wanted to vote and it had nothing to do with whether his friends were hired. A few days after this, Cruz recalled speaking with May again in the warehouse. Somehow their conversation turned to the fact that Cruz was going to buy a new lawnmower. According to Cruz, May asked if he could have Cruz' old lawnmower. Cruz said that would look

as if he were buying May's vote. He told May that if he still had the lawnmower after the election, May could have it. Based upon their relative demeanors, I credit Herrera and Cruz and, accordingly, this allegation is dismissed.

5 E. Alleged Objectional Conduct

10 In Objection 6, Petitioner asserts that the location of the polling place intimidated voters because it was adjacent to the supervisors' offices, voters had to walk by the offices to vote, and the room where the voting took place was previously used by the Employer for captive audience and other meetings with employees wherein the Employer urged the employees to vote against the Union.

15 The videos regarding negotiations and strikes were held in a back office called the Trader Joe's office. This was the same office in which the election was conducted. Cruz agreed that he explained to employees that they had a right to strike and if they decided to go out on strike, the company had the right to continue doing business and could permanently replace employees. Cruz also explained that when the strike is over, strikers go on a preferential list.

20 According to consultant Cruz, during a pre-election conference with the NLRB agent conducting the election, Union observer Delgado noted that the Trader Joe's office, where the election was going to be held, was the same space used for captive audience meetings. Delgado then shook his head and said okay.

25 There is no evidence of surveillance or misconduct at the election site. Because I have dismissed the allegations regarding campaign misconduct by the consultants, who used the same room as the polling place in which to conduct election meetings and to show videos, I find that no atmosphere of fear, intimidation or coercion lingered in the room. Accordingly, I find that by holding the election in the same room that was utilized for pre-election campaigning by the employer, no election interference occurred.

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Conclusions of Law

- 35 1. By discharging Miguel Canche, Maria Elizabeth Ku Gonzalez, Miguel Lopez Mojica and Jose Camilio Casanova, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.
- 40 2. By requesting that Personnel Plus no longer send its employee Juan Casanova to work at the Chino warehouse, thereby denying Juan Casanova work opportunities, Respondent violated Section 8(a)(1) and (3) of the Act.
- 45 3. By asking an employee whether there were employees organizing for the union at the Chino warehouse, Respondent violated Section 8(a)(1) of the Act.
4. By telling an employee that Respondent would shut down its facility if the employees did not vote for Respondent, Respondent violated Section 8(a)(1) of the Act.
- 50 5. By asking employees how they would vote in the election, Respondent violated Section 8(a)(1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Having requested that Personnel Plus no longer send Juan Casanova to its Chino warehouse, Respondent must request that Personnel Plus reinstate Juan Casanova at the Chino warehouse and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of the request that he not be sent to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent's interrogations and threat of plant closure were committed during the election campaign. This unlawful conduct interfered with the "laboratory conditions" of the election. Unless the violations are *de minimus*, a second election is necessary to remedy this conduct. *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). In determining whether unfair labor practices within the critical pre-election period improperly interfered with the conduct of a fair election, such factors as the number of violations, their severity, and the extent of dissemination are examined. *Caron International*, 246 NLRB 1120 (1979). In the instant case, there is no evidence that the interrogations or threat were disseminated to other employees. Nevertheless, the threat of plant closure is one of the more serious unfair labor practices which an employer may commit during the pre-election period. Although the number of unfair labor practices is not great, I note that in a unit of approximately 125 eligible voters, the vote was extremely close (59 for representation by the union and 61 opposed with two nondeterminative challenged ballots). Under these circumstances, I am unable to conclude that the misconduct was *de minimus*. Accordingly, I recommend that merit be found to union objections 2 and 3 and I further recommend that the election of July 24, 2002, be set aside and a second election be conducted.

On brief, the Petitioner/Charging Party (but not the General Counsel) further asks that, as part of the remedy for the Respondent's unfair labor practices and election interference, the Board issue an order that the Respondent be required to bargain with the Union. In support of this request, the Charging Party argues that the instant case falls within the category of cases described by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) as those in which the possibility of erasing the effects of past unfair labor practices and of ensuring a fair election or a fair rerun by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through authorization cards would, on balance, be better protected by a bargaining order. *Gissel Packing Co.*, *supra*, 395 U.S. at 614-615. Not only is there no evidence that a majority of employee sentiment was ever expressed by cards that designated the Union as the collective-bargaining representative of the employees, but there is also insufficient evidence that the unfair labor practices which I have found are likely to have such a lasting effect that traditional remedies are inadequate to ensure a fair rerun election.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

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ORDER

Respondent, Mike Campbell & Associates, LTD., Inc., Chino, California, its officers, agents, successors, and assigns, shall

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1. Cease and desist from

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- a. Discharging its employees Miguel Canche, Maria Elizabeth Ku Gonzalez, Miguel Lopez Mojica and Jose Camilio Casanova, or any other employees because they have joined the United Food & Commercial Workers International Union, Local 1428, AFL-CIO, CLC and engaged in concerted activities and to discourage employees from engaging in these activities.

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- b. Requesting that Personnel Plus no longer send its employee Juan Casanova to work at the Chino warehouse, thereby denying Juan Casanova work opportunities, because he has joined the United Food & Commercial Workers International Union, Local 1428, AFL-CIO, CLC and engaged in concerted activities and to discourage employees from engaging in these activities.

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- c. Asking an employee whether there were employees organizing for the union at the Chino warehouse.

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- d. Telling an employee that Respondent would shut down its facility if the employees did not vote for Respondent.

- e. Asking employees how they would vote in the election.

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- f. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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Act.

2. Take the following affirmative action necessary to effectuate the policies of the

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- a. Within 14 days from the date of this Order, offer Miguel Canche, Maria Elizabeth Ku Gonzalez, Miguel Lopez Mojica and Jose Camilio Casanova full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. Within 14 days from the date of this Order, request that Personnel Plus offer Juan Casanova full

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⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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- b. reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights of privileges previously enjoyed.
- 5 c. Make Miguel Canche, Maria Elizabeth Ku Gonzalez, Juan Casanova, Miguel Lopez Mojica and Jose Camilio Casanova whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.
- 10 d. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way. Within 14 days from the date of this Order, request that Personnel Plus remove from its files any
- 15 reference to the unlawful discharge of Juan Casanova, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.
- 20 e. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such
- 25 records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- 30 f. Within 14 days after service by the Region, post at its warehouse in Chino, California copies of the attached notice, in English and Spanish, marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in
- 35 conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and
- 40 mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 14, 2002.
- 45 g. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁵ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF

50 APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED, pursuant to the parties' agreement to sustain the challenge to the ballot of Martin Bautista, that the Regional Director for Region 31 shall, within 14 days from the date of this Order, prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the previously stipulated appropriate bargaining unit whenever the Regional Director deems it to be appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employees employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in any economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Those eligible shall vote whether they desire to be represented for collective bargaining by United Food & Commercial Workers International Union, Local 1428, AFL-CIO, CLC. To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated September 22, 2003
San Francisco, California

Mary Miller Cracraft
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting United Food & Commercial Workers International Union, Local 1428, AFL-CIO, CLC or any other union.

WE WILL NOT ask you whether there are employees organizing for the union at the Chino warehouse.

WE WILL NOT tell you that we will shut down the Chino warehouse if you do not vote for us.

WE WILL NOT ask you how you plan to vote in the election.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Miguel Canche, Maria Elizabeth Ku Gonzalez, Miguel Lopez Mojica, and Jose Camilio Casanova full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, request that Personnel Plus offer Juan Casanova full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Miguel Canche, Maria Elizabeth Ku Gonzalez, Juan Casanova, Miguel Lopez Mojica, and Jose Camilio Casanova whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Miguel Canche, Maria Elizabeth Ku Gonzalez, Miguel Lopez Mojica, and Jose Camilio Casanova, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, request that Personnel Plus remove from its files any reference to our unlawful refusal to allow referral of Juan Casanova to the Chino warehouse, and that Personnel Plus, within 3 days thereafter, notify him in writing that this has been done and that our refusal to use him at the Chino warehouse will not be used against him in any way.

MIKE CAMPBELL & ASSOCIATES, LTD., INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824

(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7123.